IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 485

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS UNION, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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Statutes Cited.

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To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on July 25, 1963.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court, printed in Appendix A, *infra*, pp. 15-30, is reported in 200 F. Supp. 653. The opinion of the Court of Appeals, printed in Appendix B, *infra*, pp. 31-36, is unreported at this time.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix C, *infra*, p. 37, was entered on July 25, 1963. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the doctrine of preemption of labor disputes bars a federal court from exercising pendent jurisdiction to award actual and punitive damages based upon alleged violations of state common law where as here the alleged violations do not arise under Section 303 of the Taft-Hartley Act and where as here the doctrine of preemption bars state courts from awarding either actual or punitive damages based upon such alleged violations of state law.

2. Whether Section 303 of the Taft-Hartley Act authorizes an award of total actual damages for injury resulting directly from a lawful primary strike merely because the Union also engaged in other conduct which was found to be in violation of Section 303.

STATUTE INVOLVED.

The statutory provision involved is Section 303 of the Labor-Management Relations Act of 1947, 61 Stat. 158, 29 U. S. C., Section 187 (referred to as the "Act"). It is printed in Appendix D, *infra*, pp. 38-39. Although certain amendments to Section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 U. S. C., Sec. 187, such amendments are not germane to the questions presented in this petition.

STATEMENT.

This is a preemption case. The Petitioner, Local 20, Teamsters, Chauffeurs, and Helpers Union (referred to as "Local 20") is a labor organization and has its principal office in Toledo, Ohio (R. 121a, 126a).[1] Respondent, Lester Morton, d/b/a Lester Morton Trucking Company (referred to as "Respondent") is engaged in the operation of dump trucks and maintains his principal place of business in Tiffin, Ohio (R. 239a).

In this case the courts below have asserted jurisdiction under Section 303 of the Act, and awarded damages in the amount of $1,600 based upon conduct found unlawful under Section 303. An additional $9,300 damages were awarded "under the totality of effort rule" (R. 638a) even though Respondent has conceded that "there is no evidence of an unlawful activity in connection with" such loss (R. 210a-212a). Moreover the courts below have asserted "pendent" jurisdiction to award $8,700 actual and $15,000 punitive damages based upon "the Ohio common law regarding unlawful secondary activity" (R. 628a). Pendent jurisdiction over this state claim was asserted notwithstanding: (1) the finding that Local 20's conduct was at all times peaceful (R. 636a); and (2) the prior determination of the Ohio courts that such state courts had no jurisdiction to entertain Respondent's claim of common law secondary boycott (R. 610a). The facts giving rise to these startling results are set forth below.

(A. The Primary Strike.)

Local 20 represented Respondent's employees from 1950 until 1956 under an oral agreement (R. 33a-34a, 47a). During 1956 the Union, in an effort to secure a written

[1] The references are to the certified record filed in this Court.

agreement held a series of meetings with Respondent (R. 35a-36a, 41a-42a, 256a, 275a-278a, 357a-365a, 441a). During the course of these negotiations an impasse developed over Respondent's demand that any written agreement be conditioned upon Local 20 securing written agreements covering Respondent's competitors (R. 51a-52a, 57a, 359a, 361a-363a, 445a, 458a-459a, 499a-500a, 508a-510a, 586a-592a). This impasse precipitated a strike which commenced on April 17, 1956 (R. 239a, 256a) and terminated in early October, 1956 (R. 256a) when Respondent entered into a written contract with Local 20 (R. 275a-498a).

Local 20 engaged in peaceful picketing at Respondent's premises during the course of the strike (R. 41a, 65a, 86a, 432a-434a). There was no interference with ingress or egress at any time during the strike (R. 54a, 84a-85a, 87a, 432a), and no physical injury to person or property occurred (R. 54a-55a, 315a-318a, 622a, 636a). Some of Respondent's employees worked on the first day of the strike and continued to work through the strike (R. 106a-107a, 117a, 432a-434a, 500a). In addition new employees were hired during the strike (R. 435a).

(B. **The State Common Law "Secondary Boycott".**)

During the strike, Local 20 engaged in certain conduct which according to the District Court and the Court of Appeals, constituted a "secondary boycott" under the law of Ohio (R. 626a-628a; App. B, *infra*, p. 36). The four suppliers or customers involved and the facts relating to each, as determined by the lower courts, are as follows.

(1. **Launder Account.**)

At the time of the strike Respondent was hauling ingredients for cement to be used in connection with a high-

way construction project. Respondent was performing this work under a subcontract from Launder & Sons, Inc. (referred to as "Launder") (R. 624a). During the course of the strike Local 20 requested the management of Launder to refrain from using Respondent's trucks (R. 624a-625a). As a result of this request Launder ceased doing business with Morton until the strike was ended (R. 625a). Damages in the amount of $8,700[2] were awarded by the District Court (R. 644a) and this award was affirmed by the Court of Appeals.

(2. **O'Connell Account.**)

According to the courts below Local 20 requested the cooperation of the management of the Louis O'Connell Coal Co. (referred to as "O'Connell") and encouraged O'Connell's employees to engage in a concerted refusal to "use" Respondent's trucks for the purpose of causing O'Connell to cease doing business with Respondent (R. 624a). As a result, O'Connell ceased doing business with Respondent for the duration of the strike (R. 624a). Damages in the amount of $1,600 were awarded by the District Court and this award was affirmed by the Court of Appeals (R. 644a; App. B, *infra*, p. 36).

(3. **France & Schoen Accounts.**)

The courts below also found that Local 20 encouraged the employees of France Stone Company (referred to as "France") and the employees of C. A. Schoen, Inc. (referred to as "Schoen") to engage in a "concerted refusal to load" Respondent's trucks for the purpose of requiring France (R. 623a) and Schoen (R. 625a) to cease doing business with Respondent. It is undisputed that there was no work stoppage or slowdown by either France (R.

[2] References to damages will be made in round figures.

71a, 89a, 90a, 104a, 126a, 134a) or Schoen (R. 94a-95a) employees. No damages were claimed (R. 180a, 475a) or awarded (R. 644a) in connection with the alleged inducement of the France and Schoen employees.

Compensatory damages of $10,300 (Launder $8,700 and O'Connell $1,600) and punitive damages in the amount of $15,000 (R. 626a-627a, 644a-645a) were awarded by the District Court on the theory that Local 20 by the conduct set forth above "violated the Ohio common law regarding unlawful secondary activity" (R. 628a). The District Court's theory of liability and its award of damages were approved by the Court of Appeals (App. B, *infra*, p. 36). The District Court and the Court of Appeals thought it immaterial that: (1) Local 20's conduct giving rise to the claim of common law secondary boycott was peaceful (R. 644a; App. B, *infra*, p. 34), and (2) the state courts of Ohio had previously held that such state courts were without jurisdiction to award damages based upon Respondent's claim of common law secondary boycott (R. 440a; App. B, *infra*, p. 34).

(C. The Alleged Section 303 Violations.)

(1. O'Connell, France & Schoen Accounts.)

The courts below also concluded that Local 20's conduct in connection with France (no damages), Schoen (no damages) and O'Connell ($1,600 damages) violated Section 303 of the Act. Viewed most strongly in Respondent's favor, the evidence with regard to O'Connell shows only that Local 20 advised its steward employed by O'Connell of the strike against Respondent and requested him to refrain from using Respondent's trucks (R. 152a). The steward had no occasion in the course of his employment to operate Respondent's trucks and had no authority to terminate Respondent's relation with

O'Connell (R. 154a-155a). Accordingly, the steward reported his conversation to the O'Connell management (R. 153a, 157a). Upon learning that a strike had been called against Respondent the O'Connell management arranged for other trucking services (R. 186a). There were no strikes, picketing or threats of strikes or picketing against O'Connell (R. 166a-167a).

(2. **Wilson Account.**)

Prior to the strike, Respondent was performing work for Wilson Sand & Gravel Co. (referred to as "Wilson"). Respondent conceded that there is "no evidence of an unlawful activity in connection with this particular job" (R. 210a-211a). It is undisputed that the Wilson work was lost for the duration of the strike because of a lack of drivers during the strike (R. 229a, 231a, 253a). Compensatory damages in the amount of $9,300 were awarded because of the loss of revenue from Wilson. The District Court assessed these damages "under the totality of effort rule" (R. 638a). Although Local 20 devoted one-third of its brief in the Court of Appeals to an attack upon the "totality of effort rule" the Court of Appeals affirmed the District Court without addressing itself to this issue.

The opinion below represents an anomalous and unwarranted extension of liability under Section 303 of the Act; one which is in direct conflict with the previous decisions of this Court and of other state and federal appellate courts. If allowed to stand it will have a serious impact upon the administration of the Act. Hence, this Petition for Writ of Certiorari has been filed.

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Is Inconsistent With the Preemption Decisions of This Court and Is in Conflict With a Preemption Decision of the Tennessee Supreme Court.

It will be recalled that the Labor Management Relations Act of 1947 created union unfair labor practices. Section 8 (b) (4) of the Act provided that certain primary and secondary activities by a labor organization constituted an unfair labor practice. The National Labor Relations Board was given exclusive jurisdiction to remedy such practices. *Garner v. Teamsters Union*, 346 U. S. 485, Section 303 of the Act, repeating *haec verba* the prohibitions set forth in Section 8 (b) (4)[3] conferred a private right of action for damages against labor organizations which engage in conduct therein defined as unlawful. "[A]ny court having jurisdiction of the parties" is specifically authorized by Section 303 (b) to entertain such a suit.[4] Thus, a state or federal court in a Section 303 action must determine whether the union has engaged in activities which are in violation of that Section. To this extent the adjudicatory process of the state or federal court is identical to that performed by the National Labor Relations Board under Section 8 (b) (4); and to that extent the doctrine of federal preemption (i. e. primary, exclusive jurisdiction of the Board) is inapplicable in damage actions brought pursuant to Section 303. *Cf. Atkinson v. Sinclair Refinery*, 370 U. S. 238, 245n.

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[3] *Longshoremen's Union v. Juneau Corp.*, 342 U. S. 237, 244; *NLRB v. Denver Bldg. & Construction T. Council*, 341 U. S. 675, 686.

[4] As a result of the 1959 amendments to the Act, Section 303 merely incorporates by reference the prohibitions contained in Section 8 (b) (4).

Local 20 has not at any time and does not presently contend that the preemption doctrine is applicable to the adjudicatory process necessarily involved in the administration of Section 303 of the Act. Local 20 has consistently asserted, however, that once a federal or state court determines that certain peaceful conduct is not unlawful under Section 303 of the Act, such court is under the preemption doctrine without jurisdiction to award damages based upon the common law of the state in which the court sits.[5] The contrary holding below is in direct conflict with this Court's preemption decision in *Electrical Workers Local 426 v. Baumgartners Elec. Constr. Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 286, 91 N. W. 2d 663.

The plaintiff in *Baumgartners* case sued in state court for damages arising out of peaceful picketing at several construction job sites. The plaintiff in that case could have[6] but did not invoke Section 303 of the Act; instead the plaintiff rested his claim squarely upon state law. Affirming an award of actual and punitive damages the South Dakota state supreme court rejected the union's claim of preemption. The South Dakota court, *like the courts below*, adopted the view that damages could be awarded for union conduct which violated state law regardless of the fact that the union's conduct was peaceful. This Court, citing its preemption decision *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236, reversed.

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[5] Compensatory damages in the amount of $8,700 based upon the loss of the Launder account and $15,000 punitive damages were awarded below *solely* on the theory that certain peaceful conduct by Local 24 constituted a common law secondary boycott. The relevant facts are set forth in the Statement of the Case, *supra*, p. 6 (R. 624a, 625a, 628a).

[6] Construction job site picketing has given rise to a flood of litigation under both Section 8 (b) (4) and Section 303 of the Act. See e. g. *NLRB v. Denver Bldg. & Construction T. Council*, 341 U. S. 675.

Thus *Baumgartners* case plainly bars a damage action based upon state law where, as here, the union's conduct is peaceful. The fact that the state court in *Baumgartners* case could have entertained a damage action under Section 303 did not save it from reversal when it awarded damages under state law. And as noted in the *Garmon* case "the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." 359 U. S. at 245.

Recognizing and applying the preemption principles here urged by Local 20, the North Carolina Supreme Court in *Overnight Transportation Co. v. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, *cert. denied* 371 U. S. 862, recently disallowed $500,000 punitive damages awarded under state common law principles.[7] In *Overnight*, as here, the plaintiff invoked Section 303 of the Act, and the common law of the state. In *Overnight*, as here, there was no violence. In *Overnight* the Court held that the doctrine of preemption barred reliance upon state common law. The courts below in the instant case ruled contrariwise.

Rejecting Local 20's contention that preemption doctrine precluded consideration of state common law, the Court below expressed the view that violence *vis a vis* nonviolence was irrelevant. In this regard the Court below stated, "No decided case has been called to our attention in support of this contention by [Local 20] (App. B, *infra*, p. 32). In the Court below Local 20 pointed out *inter alia* that "An examination of the legislative history of the Act reveals that the Congress expressly intended to exempt mob action and violence from the preemption doctrine

[7] See also: *Pennsylvania Tidewater Dock Company v. National Maritime Union*, 206 F. Supp 764 (E. D. Pa.), where the court declined on the grounds of preemption to entertain a common law claim even though diversity of citizenship existed.

[*United Construction Workers v.*] *Laburnam*, 347 U. S. at 668-669" (Appellant's Br. p. 16). The refusal of the Court below to apply the well-established distinction drawn in preemption cases between violent and non-violent conduct is in direct conflict with not only *Laburnam* but also with *Youngdahl v. Rainfair*, 355 U. S. 131, 139-140.

The preemption doctrine, of course, applies with equal force to federal as well as state court proceedings. *San Diego Building Trades v. Garmon*, 359 U. S. 236, 245; *Weber v. Anheuser Busch*, 348 U. S. 468, 479. Nevertheless, the view expressed below—that federal courts exercising pendent jurisdiction possess *greater* jurisdiction than state courts insofar as *state law* is concerned—calls for separate comment. Local 20 in the court below and in this Court respectfully submits that when a federal court exercises either diversity or pendent jurisdiction, such federal court cannot assert jurisdiction with respect to state matters *unless* the state court could have asserted jurisdiction. *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 328; *Angel v. Bullington*, 330 U. S. 183, 191-192; *Woods v. Interstate Realty Co.*, 337 U. S. 535, 537-538. The contrary ruilng below should not be permitted to stand.

B. The Courts Below Awarded Damages for Injury Proximately Caused by the Primary Strike Under the "Totality of Effort Rule;" This "Rule" Has Been Considered and Rejected by the District of Columbia Court of Appeals.

As set forth more fully in the opening section of this petition, *supra*, p. 7, the District Court awarded damages for financial losses proximately caused by a lawful, primary strike (i. e., the Wilson account). The court below without comment affirmed. The decision below is consistent with *Carpenters Local 131 v. Cisco Construc-*

tion Co., 266 F. 2d 365 (C. A. 9), *cert. denied*, 361 U. S. 828—the case in which the "totality of effort rule" was first announced. The Court of Appeals for the District of Columbia considered and rejected that "rule" in *Chauffeurs Local 175 v. NLRB*, 294 F. 2d 261, 262 (C. A. D. C.), stating:[8]

> "But peaceful primary picketing and its normal incidents, including requests to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere."

In light of the "identity of language" (*Longshoremen's Union v. Juneau Corp.*, 342 U. S. 237, 244), between Section 303 and 8 (b) (4) of the Act, it is, we submit, of no moment that the *Local 175* case arose under Section 8 (b) (4) whereas the instant case arises under Section 303. A conflict over the interpretation of an important statutory policy has arisen. It should be resolved.

C. The Issues Involved in This Case Are of Great Importance to the Administration of the National Labor Relations Act.

Since Section 303 came into being in 1947, damages well in excess of $3,000,000 have been awarded by state and federal courts (Appendix E, *infra*, p. 40). Over half of this grand total has been awarded in federal court proceedings in the Sixth Circuit. Importantly contributing to this unusual concentration of money judgments in the Sixth Circuit is its approval—in eight cases—of punitive damage awards. There is only one reported case, outside of the

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[8] With respect to the "totality of the effort rule," the Seventh Circuit—although finding it unnecessary to make a definitive ruling—commented: "Some kind of a theory of 'totality of efforts' is . . . suggested whereby . . . incidents, by themselves lawful, become unlawful by an incident at some other location." *Milwaukee Plywood Co. v. NLRB*, 285 F. 2d 325, 329 (C. A. 7).

Sixth Circuit, in which punitive damages have been awarded in a case arising under Section 303 (Appendix E, *infra*, p. 41).

Punitive damages are not authorized by Section 303 of the Act.[9] In every case arising under Section 303 in which punitive damages have been awarded such damages have been predicated solely upon state common law. In each of these cases—*except the case at bar*—the award of punitive damages was based upon proven violence (App. E, *infra*, p. 41). Since Local 20's conduct was at all times peaceful, the award of punitive damages in this case represents an unprecedented departure from the established rules which heretofore controlled litigation under Section 303 of the Act. For as demonstrated in the first section of this petition, this Court has consistently held that absent violence the preemption doctrine bars an award of either actual or punitive damages based upon common law principles.

When punitive damages and the "totality of effort rule" are joined, as they were in this case, the liability imposed bears no resemblance whatsoever to the standard enacted by the Congress; namely that "Whoever shall be injured in his business or property *by reason of any violation of subsection (a)* . . . , shall recover the *damages by him sustained* . . ." (Sec. 303 (b), Emphasis added.)

Moreover, by enacting Section 303, the Congress intended to assure "uniformity, otherwise lacking, in rights of recovery in the state courts . . ." *Loburnam*, 347 U. S. at 665-666. Yet under the decisions below, recovery of puni-

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[9] Congress did not contemplate an award of punitive damages when it enacted Sec. 303. See e. g.: *United Mine Workers v. Patton*, 211 F. 2d 742, 747-750 (C. A. 4), where the legislative history of Sec. 303 is reviewed. Cf. *Harvey Aluminum v. Longshoremen's Union*, 278 F. 2d 63 (C. A. 9).

tive damages depend upon the law of the state in which the case arises.

Sections 7 and 13 of the Act guarantee the right to strike, yet if the decision below stands, the cost of exercising that right may be too dear.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

In the
United States District Court
For the Northern District of Ohio,
Western Division.

Lester Morton, d/b/a Lester Morton Trucking Company, Route No. 2, Tiffin, Ohio,

Plaintiff,

vs.

Local 20, Teamsters, Chauffeurs and Helpers Union, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 435 South Hawley Street, Toledo 6, Ohio,

Defendant.

No. 8222. Civil.

Opinion of the Court.

(Filed December 26, 1961, C. B. Watkins, Clerk, U. S. District Court, N. D. O.)

Kloeb, J.

Under date of December 16, 1960, plaintiff filed his second amended complaint in which he alleges, in effect, the following: That this action arises under the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. A. 145; that complainant is engaged in the trucking business as a sole proprietor under the name of Lester Morton Trucking Company, at Tiffin, Ohio, and that defendant is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; that, on the 17th day of August, 1956, at about 5:30 o'clock

A. M., the defendant wilfully, maliciously and in pursuance of a conspiracy to injure, damage and destroy complainant's trucking business, caused approximately fifteen men to appear at the complainant's business premises and to picket said place of business with signs or banners, and that the aforesaid picketing by large numbers of men was caused to continue until August 21, 1956, on which date an injunction against picketing by more than two men at each entrance was issued by the Common Pleas Court of Seneca County, Ohio, and that said picketing by large numbers of men continued in violation of said injunction, and with the knowledge of and under the instructions of the defendant; that defendant unlawfully obstructed and interfered with complainant's right to freely engage in his normal business activities by wilfully and maliciously threatening various persons and corporations with which the complainant had contractual relations with picketing at their construction sites if they continued to do business with complainant; that defendant further unlawfully obstructed and interfered with complainant's right to freely engage in his normal business activities by inducing and encouraging, and attempting to induce and encourage, certain employers and the employees thereof, having contractual business relations with the complainant, to engage in a concerted refusal to continue such contractual business relations with complainant, and to force and require the complainant to recognize and bargain with the defendant, who was not certified as the representative of the employees of the complainant; that defendant further unlawfully obstructed and interfered with complainant's rights by willfully and maliciously inducing and encouraging the employees of other employers to engage in concerted refusals in the course of their employment to perform services, all for the purpose of forcing and requiring such employers to cease doing business with the complainant; that the mass picketing and secondary boycott

activities engaged in by the defendant against the complainant were in violation of the provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A. 145, and caused great damage to the complainant in that, among other things, (1) He lost numerous trucking jobs as a result thereof from which he would have received substantial profits but for said mass picketing and secondary boycott activities; (2) Numerous other jobs under contract by the complainant were delayed; and (3) Nearly all of complainant's trucking equipment was forced to remain idle during the aforesaid period of time.

Wherefore, complainant prays judgment against the defendant in the amount of $50,000.00 as compensatory damages and $50,000.00 as punitive damages.

In due course, defendant filed its answer, in which it generally denied the allegations of the second amended complaint.

It appears that the plaintiff had, for many years, been engaged in the trucking business in Tiffin, Ohio, and that he engaged, among other things, in general dump truck operations in which he used his own employees to operate a fleet of approximately fifty dump trucks which were used primarily in work on highway construction; that for some years prior to the year 1956 plaintiff's drivers were members of Local 625 of the Teamsters Union, and when that Union was merged into the defendant these employees became members of the defendant, and were such members throughout the period of the strike in question; that there was no contract between the defendant and the plaintiff prior to the strike in question.

It appears further that, in August of 1956, after plaintiff's drivers had met with representatives of the defendant, and had voted to strike in the event that the parties could not agree upon the terms of a contract, plaintiff met with representatives of the defendant on August 16, 1956,

at the offices of the defendant in Fremont, Ohio; that no contract was concluded at that meeting, and that, in the early morning of August 17, a large number of plaintiff's drivers and representatives of the defendant appeared at plaintiff's garage and office premises in Tiffin and initiated the strike against plaintiff, which continued until October 5, 1956, when a contract was signed by the parties; that said contract (Defendant's Exhibit D) was dated October 5, 1956, to expire March 1, 1959; that, at the time of the trial of this case in late April and early May of this year, there was no contract between the parties and apparently there is none at this date.

Plaintiff contends that the defendant engaged in unlawful strike activity during the strike when it encouraged the plaintiff's customers and suppliers, sometimes through their employees and sometimes directly, to stop doing business with the plaintiff; that, since the defendant engaged in unlawful activities against plaintiff, plaintiff is entitled to collect all damages he suffered as a result of defendant's total strike activity; that defendant violated both Federal statutory law and State common law, and that this Court, therefore, has jurisdiction to award damages.

Section 303 of the Labor Management Relations Act of 1947, 29 U. S. C. A., Sec. 187, during the period complained of, provided, in part, as follows:

> "(a) It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . or to perform any services, where an object thereof is:
>
> > "(1) forcing or requiring any employer . . . to cease using . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . .;

"(b) Whoever shall be injured in his business or property by reason of any violation of sub-section (a) of this section may sue therefor in any district court in the United States . . . without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The unlawful secondary boycott by way of making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer, which plaintiff complains of, is predicated upon several Ohio cases, and particularly the case of *Moores & Co. v. Bricklayers' Union et al., 10 Ohio Decisions Reprint 48 (affirmed by the Supreme Court of Ohio, 51 O. S. 65)*, and the case of *Schmidt Packing Co. v. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America et al., 48 ALC 547 (1947)*, and particularly the case of *W. E. Anderson Sons Co. v. Local 311, Teamsters, etc., 156 O. S. 541;* also upon *33 Oh. Jur. 2; Labor, Sec. 64, Secondary Boycott, pages 187-188.*

The right of recovery for damages for the common law tort of conspiracy is based upon the case of *Perko v. Local 206, etc., et al., 168 O. S. 161 (1958).*

Plaintiff relies upon the case of *Carpenters Union v. Cisco, 266 Fed. (2d) 365 (cert. den. 361 U. S. 828)*, in his claim that he may recover damages measured by all of the revenue lost as the result of the entire strike activity of the defendant. In other words, he relies upon the "totality effort" rule.

In his claim of jurisdiction in this Court, as well as his right to rely upon the common law of the State, in addition to the Federal statute, plaintiff relies upon *United Mine Workers of America v. Meadow Creek Coal Co., 263 Fed. (2d) 52 (cert. den. 359 U. S. 1013)*, and *United Mine Workers of America v. Osborne Mining Co., 279 Fed. (2d) 716 (cert. den. 364 U. S. 881, 1960)*, and, in addition thereto, the common law of Ohio with respect to punitive damages as set forth in *16 Oh. Jur. 2d, Damages 281, Sec. 145 (Tort Actions, Generally)*, which reads, in part, as follows:

> "It is an established principle of law in Ohio that in actions to recover damages for tort, which involve the ingredients of fraud, malice, or insult, or the wanton or reckless disregard of the legal rights of others, the jury may go beyond the rule of mere compensation of the party aggrieved, and award exemplary or punitive damages. * * *"

Plaintiff concedes that, to the extent that it was peaceful and non-massive, the picketing that occurred at the plaintiff's garage at Tiffin was lawful. He concedes that, if the defendant had limited itself to that type of lawful activity, plaintiff would not be entitled to recover any damages from the defendant. Plaintiff contends, however, that the defendant engaged in substantial unlawful activity during the period of the defendant's strike against the plaintiff, and that it is impossible to distinguish between the damages plaintiff suffered as the result of defendant's lawful activity on the one hand and the defendant's unlawful activity on the other.

Plaintiff's premises were struck on the 17th day of August, 1956, and, on August 21, 1956, pursuant to motion filed by plaintiff in connection with the complaint filed in the Common Pleas Court of Seneca County, Ohio, that Court issued a restraining order "restraining the in-

dividual defendants and each and all of them, and all persons associated with or acting in concert with said defendants and all others to whom knowledge of this order shall come:

"1. * * *

"2. From interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent plaintiff, his agents, employees, representatives, customers and others having business with the plaintiff, from entering or leaving plaintiff's place of business and from in any way interfering with, obstructing, delaying or stopping plaintiff's lawful operation of his business or maintenance of his equipment.

"3. From, whether by secondary boycotts or otherwise, interfering with, or by violence, force, intimidation or threats, preventing or attempting to prevent any of plaintiff's customers or any other members of the public from having business relations with the plaintiff.

"4. From following plaintiff's agents, employees and representatives on the public highways or elsewhere.

"5. * * *

"6. From picketing, other than peaceably and by more than two pickets at each entrance, the plaintiff's place of business or any part thereof.

"7. * * *

"8. * * *."

(Plaintiff's Exhibit 2.)

We conclude, from the evidence, that, from and after the issuance of the aforesaid restraining order, defendant observed the requirements of paragraph 6 above, in that it thereafter confined its number of pickets at each entrance to the plaintiff's place of business to two. We further conclude from the record that, at no time during the strike

period, to wit, August 17, 1956, to October 5, 1956, both inclusive, was violent conduct engaged in.

The defendant contends that the primary strike and picketing at plaintiff's premises was not in violation of Section 303 of the Labor Management Relations Act of 1947; that it engaged in no illegal conduct with respect to the secondary or neutral employers; that inducements of individual employees do not violate Section 303 of the Act; that the picketing at France Stone Co. and Schoen Asphalt Paving Co. was primary and lawful, and that the evidence does not establish an inducement of the employees of these two concerns; that the pre-emption doctrine is an affirmative one, and that exclusive jurisdiction is vested in the National Labor Relations Board; that the pre-emption doctrine applies to conduct allegedly constituting a common law secondary boycott, and that in this case neither Federal nor State Courts have jurisdiction to award damages; that since no evidence of mob action is involved in this case the decisions heretofore cited, to wit, the *United Mine Workers of America v. Meadow Creek Coal Co.*, supra, and the *United Mine Workers v. Osborne Mining Co.*, supra, are inapplicable, that the defendant engaged in no conduct which violated the State Court restraining order, and that this Court should not, for various reasons, exercise authority to award punitive damages.

The defendant poses the following three questions as being the questions involved in this suit:

1. Whether the Union engaged in conduct which violates Section 303 of the Labor Management Relations Act of 1947;

2. Whether the Court has jurisdiction to entertain a claim for relief predicated upon an alleged common law secondary boycott;

3. Whether, in the circumstances of this case, punitive damages should be assessed against the Union.

The illegal acts complained of by plaintiff revolve around the France Stone Company, the Louis O'Connel Coal Company, the Launder & Son, Inc., and the C. A. Schoen, Inc. In addition thereto, the contracts involved those at the Wilson Sand & Gravel Co., and also the Seneca County contract.

During the trial of the case, which was tried to the Court, plaintiff's witness, William H. Heine, the Seneca County Engineer from Tiffin, Ohio, testified in connection with the contract that the County had with the Plaintiff for the hauling of stone for hardtop roads. He testified that Mr. Morton performed under the contract until August 17, 1956, and that, some time thereafter, Lawrence Evans, Business Agent of defendant, called at his office and asked him if he knew that a strike had been declared against Morton, and he replied that he did. However, on cros-examination, he stated that he had made the decision to discontinue with Morton several days before he was visited by Mr. Evans.

On the basis of this testimony, we concluded that the alleged unlawful activities of the defendant had nothing to do with the decision of the County Engineer to terminate the hauling contract with Morton, and that the damages claimed were too remote to be considered in any computation of damages. We sustained a defense motion to dismiss this claim and we, therefore, give it no further consideration.

In connection with the Wilson Sand & Gravel Co. contract, at the trial of the case we were concerned with the possible pertinency of the failure of plaintiff to perform under the contract to the conduct of the defendant of its strike, but we believe that, under the totality of effort rule, alleged damages in connection with this contract should be considered.

We believe that the acts of the defendant in connection with the France Stone Co., where Lawrence Evans, Business Agent of the defendant, took men who were striking against the plaintiff with picket signs to the premises of the France Stone Company and there set up a picket line was wrong. Plaintiff's Exhibit 13, a photograph taken by plaintiff on either the 23d or the 24th day of August, 1956, some two or three days after the issuance of the restraining order by the Common Pleas Court of Seneca County, establishes, beyond refutation, that the France Stone Company was picketed. The testimony of an employee of plaintiff, one John W. Combs (Record, p. 113), that, about a week after the strike commenced, he and his brother Joe were taken to the France Stone Co. by defendant's officer Evans corroborates the Exhibit 13. That these pickets were viewed by the employees of plaintiff, as well as the France Stone Co., is well established. The activities of defendant's agent Evans in contacting employees of the France Stone Co. is established.

We believe that the activity of defendant's agent at the France Stone Co. was unlawful under Section 303 and was an apparent effort to injure and coerce the plaintiff.

In connection with the O'Connel Coal Co., which had been a customer of plaintiff for a number of years, it was the plaintiff's duty under the contract to haul all of the O'Connel Company's requirements of sand and gravel into its Tiffin plant for use in its ready-mix concrete manufacturing operation.

Here, through the activities of one Kenneth Lidster, an employee of the Coal Co., and a steward of the defendant local; and through the activities of Irvin Mowery, Business Agent of the defendant, the O'Connel people were alerted to the strike. Contacts were made with this company by Mowery by telephone, as well as by personal visits.

We believe that Section 303 was violated in that the defendant encouraged the employees of the O'Connel Company to stop using plaintiff's trucks for the purpose of forcing or requiring the O'Connel Company to cease doing business with the plaintiff; that defendant's activity in connection with this company was unlawful under the common law of Ohio.

In connection with the Launder & Son, Inc., contract, plaintiff had a contract to transport the "batching" by truck to and at the site of a highway improvement that the Launder & Son Company was engaged in constructing. Here defendant's Business Agent Evans took strikers to the Launder job and, while there, talked to a boss on the Launder job, and asked him not to let any of plaintiff's trucks work there.

In connection with the C. A. Schoen, Inc., company, defendant's Business Agent Evans, together with some of the strikers, followed trucks of plaintiff to a stone quarry and then followed the trucks to Toledo to the premises of the Schoen company, where picketing was set up, where following conversation with defendant's Business Agent Sullenger, Schoen refused to permit the sand transported by plaintiff to be received. Other activities in connection with Schoen were along the same general lines. We believe that these activities were in violation not only of the Federal statute but the State common law.

In the course of the trial, Irvin Mowery was the first witness called by plaintiff. He testified that he was an organizer for Local 20, and that Sullenger, Evans and Reagan also worked out of the Toledo office; that, on the morning of the strike, he observed Evans there and that there were around thirty of Morton's employees and three pickets on duty; that he went to the O'Connel Company the next day after the start of the strike, where the O'Connel employees were members of the defendant local; that he

talked to their steward there and that, thereafter, he visited the O'Connel company once a week; that he talked with Howard Magers, Junior, President of the O'Connel company, three or four days before the strike and told him of the possibility of a strike, and at strike time he called Mr. Magers on the telephone and asked his co-operation.

John W. Combs testified that he worked for plaintiff in 1956, and that he belonged to the defendant local; that, on the first day, he stood picket at 8:00 A. M. and around 25 men were out there; that he appeared again the next day and that the same number of men were there, and that when the Court order issued 6 or 8 were there at any one time; that he went out to the France Stone Company with his brother under the direction of Mr. Evans and there set up a picket with signs; that Evans took him and his brother Joe to Fremont where the by-pass of Route 20 was being constructed by the Launder Company, and that Evans told the man at the gate not to let Morton's trucks in, and the man responded "I would like to go along with you"; that he and his brother and James Marcum, together with Evans, followed three of Morton's trucks as they came out empty at 9:00 A. M. to Maple Grove quarry five miles north of Tiffin where the trucks were loaded with No. 8 sand, and that they then followed the trucks into Toledo to the Schoen Asphalt Company where Evans talked with someone, and the trucks were not unloaded; that the drivers of the trucks left in a car, and that he and his brother got out with a picket sign along with James Marcum and placed themselves at the entrance. On cross-examination, he testified that after the Court order had issued the number of pickets at the entrances was reduced to 4.

Hubert Olds testified that he was a mechanic at the France Stone Company and a member of the operating engineers' Union; that a teamsters' Union man talked

with the Plant Superintendent, C. C. Robinson, and himself.

Witness Vernon Beam testified that he and Stokes and Cliff Smith took three trucks to the Dolomite quarry and loaded them with sand, and that they were followed by Evans, accompanied by Joe and John Combs; that they pulled into Schoen Asphalt just a few seconds after the trucks arrived; that Evans went into the office and that the Schoen Superintendent came out and "told us we couldn't unload"; that no trucks were unloaded and that "we left with Mr. Morton in his car"; that at the Schoen gates he saw two picket signs on each side of the entrance; that the Project Engineer at the by-pass on Route 20 "told us to take our trucks off the job after Larry Evans came out of the office."

Witness Charles Robinson testified that he drove into the France plant where he was employed as a Plant Manager, and saw the men at the entrance with picket signs, and that a fellow then came in in a black Cadillac.

Howard Stultz testified that he worked for plaintiff in 1956, but that he is not now working for plaintiff; that his position was that of a mechanic, and that he drove a truck for plaintiff in August of 1956; that he worked as a mechanic in the garage until the third or fourth day of the strike when he hauled sand to Schoen Asphalt in Toledo from the Dolomite quarry; that he saw men standing around a car talking, but saw no signs; that a man came out of the office and "told us to leave the truck unloaded"; that when he left the men were still at the gate; that he drove into the France Stone Company during the strike and saw a sign there at least two days indicating "Morton Company on strike"; that he saw the two Combs' boys and Nye with the signs.

Elmer Luttrell testified that he was employed by Launder & Sons in 1956 as Field Office and Batch Plant Man-

ager; that his employer was paving Route 20 by-pass; that they were using Morton's dump trucks and batch trucks, and that he was informed by Mr. Launder of the Morton strike; that after the strike three of Morton's trucks appeared for a short period of time; that Larry Evans "called me and asked if Morton's trucks were on the job".

Kenneth Lidster testified that he worked for the O'Connel Company in 1956, making ready-mix; that he drove a truck, and that the plaintiff "hauled our sand and I then belonged to Local 20"; that Irvin Mowery, one of defendant's Business Agents, called to see him, and that Mowery said they had a strike on Morton and he would just as leave "we didn't use his trucks"; that "I told our boss Howard Magers".

Howard Magers, Jr. testified that Kenneth Lidster "our Union Steward" informed me that Morton had been struck and he had b n so informed by a teamster.

James Schoen testified that he was a paving contractor, Treasurer of Schoen Asphalt, and that Morton supplied sand in 1956; that, on August 20, he saw a sign at his entrance "Morton's strike", and that there were people around; that he talked to Ed Sullenger, Business Agent of defendant, and Sullenger "told us we could not and should not deal with Morton on strike; that the trucks should remain unloaded"; that he further had two conversations in his office with Sullenger, "when he tried to persuade us not to do business with Morton"; that he had other conversations over the telephone with Sullenger, all occurring within a week after the strike commenced, all "trying to persuade us not to use Morton's sand"; that a Mr. Evans also joined with Sullenger in the first conversation, but that he could not identify Evans.

Ransom Taulbee testified that he worked for plaintiff in 1956; that he did not work during the strike, the

reason was he did not want trouble, and that some trucks left plaintiff's during the strike, and that the trucks that left were followed by Evans and others; that he did not want to take a truck out and get followed or get hurt. On cross-examination, he testified that he saw Evans follow trucks more than once.

We have reviewed here some, but not all, of the activities engaged in by the defendant, through its Business Agents, in contacting suppliers and others that were doing business with the plaintiff in an apparent effort to discourage further business with plaintiff, and to injure the plaintiff in the operation of his business. Some of these activities, unfortunately, were engaged in after and in the face of the restraining order issued by the Common Pleas Court of Seneca County on the 21st day of August, 1956. Some of the contacts made by defendant's agents were made with employees of plaintiff's suppliers and companies with which the plaintiff was doing business, and some of the contacts were made with managers or superintendents or officers of these companies. All of them, apparently, had the same purpose in mind.

Looking at the picture as a whole, we conclude that the special damages suffered by plaintiff in connection with the Launder matter amounted to the sum of $8,684.92; in connection with the O'Connel Company in the amount of $1,644.79, and in connection with the Wilson Company in the amount of $9,289.91, for a sum total of $19,619.62. Compensatory damages, therefore, in the sum of $19,619.62 are awarded.

Coming to the question of punitive damages, we believe that some punitive damages should be awarded. The conduct of defendant, through its agents, constituting secondary activity was in violation not only of the Federal statute but of the common law of Ohio relative to secondary boycotts and conspiracy. Some of this activity, in viola-

tion of the restraining order of the Common Pleas Court of Seneca County, is regrettable.

Although the punitive damages awarded in the Meadow Creek and the Osborne cases, supra, were predicated substantially upon the extreme violence that pervaded the strikes, we see no reason why the award of punitive damages should be limited to cases where violence is engaged in. Here the objective was to bring the plaintiff to his knees, and the means employed were unlawful. An award of $15,000.00 as and for punitive damages is assessed.

In the course of our consideration of this case, we have not only studied and considered the cases of the United Mine Workers and the Osborne Company, supra, but also, in particular, the following cases: *Local Union No. 984, etc, et al. v. Humko Company, Inc. etc. et al.*, 287 Fed. (2d) 231 (Cert. Den. 1961); *Carpenters Union, Local 131 et al. v. Cisco Construction Co., etc.*, 266 Fed. (2d) 365 (Cert. Den. 361 U. S. 828), and the case of *United Brick & Clay Workers of America et al. v. Deena Artware, Inc.* (6th Cir.), 198 Fed. (2d) 637, which is cited in the Cisco case, supra; also the case of *William Gilchrist, Jr. et al. v. United Mine Workers of America*, 290 Fed. (2d) 36 (Cert. Pending 12/14/61).

Plaintiff may, within fifteen (15) days, prepare and lodge with the Court Findings of Fact and Conclusions of Law drawn in accordance with this Opinion. Defendant may, within fifteen (15) days thereafter, note its exceptions or suggested additions thereto.

An order may be drawn accordingly.

(signed) Frank L. Kloeb,
United States District Judge.

Toledo, Ohio.

APPENDIX B.

No. 14984.

United States Court of Appeals
For the Sixth Circuit.

Lester Morton, d/b/a Lester Morton Trucking Company,
Plaintiff-Appellee,

v.

Local 20, Teamsters, Chauffeurs, and Helpers Union, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Ohio, Western Division.

Decided July 25, 1963.

Before: O'Sullivan, Circuit Judge, Boyd and Thornton, District Judges.

Thornton, District Judge. Plaintiff filed this action in the district court seeking damages on account of a secondary boycott against it. The primary strike commenced August 17, 1956 and continued until October 5, 1956. Plaintiff claims that defendant's activities were unlawful within the purview of § 303 of the Labor Management Relations Act of 1947, 29 U. S. C. A., § 187, as well as being unlawful under the common law of the State of Ohio.

District Judge Kloeb, by his findings of fact and conclusions of law filed separately from his opinion, found that defendant had engaged in unlawful secondary activity that was violative of § 303 and also of the common law of Ohio. He awarded $19,619.62 compensatory damages plus $15,000.00 punitive damages.

The questions raised by appellant-defendant on this appeal have been resolved on one or more prior occasions by the Supreme Court of the United States or by this court. Defendant seeks to distinguish this case from those that have preceded it in the various particulars upon which it bases its argument for reversal.

I. Jurisdiction Where Federal Claim Joined With Non-Federal Common Law Tort Action.

Defendant contends that a federal court is without jurisdiction to entertain a suit for damages based on a secondary boycott unlawful under state law even though the suit also seeks damages under § 303 for an unlawful secondary boycott. This contention is directly contrary to the holding in the 1933 decision of *Hurn v. Ousler*, 289 U. S. 238, as well as that in a number of recent cases decided by this court. Included among these are *Flame Coal Company v. United Mine Workers of America*, 303 F. (2) 39 (6 Cir., 1962); *White Oak Coal Company v. United Mine Workers of America*, decided May 24, 1963, ... F. (2) ... (6 Cir.); *United Mine Workers of America v. Meadow Creek Coal Company*, 263 F. (2) 52 (6 Cir., 1959), certiorari denied, 359 U. S. 1013; and *United Mine Workers of America v. Osborne Mining Co.*, 279 F. (2) 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887. Defendant contends that since there was no violence in the instant case a different rule applies. We are not aware of such a distinction and in fact are unable to appreciate any legal or logical reason for such a jurisdictional distinction. No

decided case has been called to our attention in support of this contention by defendant. Another aspect of this argument advanced by defendant is that if the state court could not have entertained this suit for damages under state common law because of pre-emption by federal law there can be no recovery here. This contention is disposed of adversely to defendant by the holdings in the five cases above cited. The holdings in these cases permit joining federal and nonfederal grounds in support of a cause of action. A nonfederal cause of action is not extinguished because a state court is pre-empted by federal law from providing relief. We do not here decide that a state court *is* pre-empted from entertaining such a suit and awarding damages. We make the observation that the Supreme Court on December 10, 1962 handed down a decision holding that a § 301 action was not subject to the pre-emption doctrine under Garmon.[1] *Smith v. Evening News*, 371 U. S. 195. It may be that the same considerations apply to a § 303 cause of action. See *Local 100 of the United Association of Journeymen and Apprentices v. Borden*, decided June 3, 1963, ... U. S. ..., footnote 3 of which reads as follows:

> "49 Stat. 452, as amended, 28 U. S. C., §§ 157, 158. We do not deal here with suits brought in state courts under §§ 301 or 303 of the Labor Management Relations Act, 61 Stat. 156, 158, 29 U. S. C., §§ 185, 187, which are governed by federal law and to which different principles are applicable. See, e. g., *Smith v. Evening News Assn.*, 371 U. S. 195."

Is it not implicit in the above that state courts are not subject to the pre-emption doctrine insofar as *both* § 301 and § 303 are concerned?

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[1] San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959).

II. Denial of Motion to Amend Answer.

Prior to the trial date in the district court defendant asked for leave to file a motion to dismiss the amended complaint. Such leave was granted. The basis for the motion was set forth in defendant's memorandum in support thereof, namely, that a state court order dismissing plaintiff's action for the common law secondary boycott damages was res judicata and that such subject matter therefore could not be included in the instant suit in federal district court. The order of the state court reads as follows:

> "It is Ordered that this matter be, and the same hereby is, dismissed otherwise than upon the merits, without the consent of the plaintiff, *without prejudice to a new action based upon the same subject matter,** and for the reason that the Court does not have jurisdiction of the subject matter under the decision of the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 49 A. L. C. 485. Exceptions saved to the plaintiff and defendant's costs taxed to the plaintiff."

It is clear that the reason for its issuance was the doctrine of pre-emption. The state court's citation of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), was obviously for the purpose of indicating the authority upon which it relied in holding that state court jurisdiction was absent, not for the purpose of determining that jurisdiction was present in some other forum, a determination that may be made initially only by each forum for itself. It happens that the court in *San Diego* was concerned with the primary jurisdiction of the National Labor Relations Board to adjudicate the status of a disputed activity. The court there said that "(W)hen an activity is arguably

* Emphasis supplied.

subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. It also said: "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate." *San Diego v. Garmon*, supra, 245-246. The Board has no power therefore to award compensation. Neither has the state court such power in an area of federal pre-emption. However, Congress has provided a forum by virtue of 29 U. S. C. A., § 187, and this is completely independent of any National Labor Relations Board proceeding.[2] *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U. S. 237 (1952). The trial court denied this motion to dismiss. When the trial of this case began defendant again sought to present its res judicata contention by moving to amend its answer to add res judicata as an affirmative defense. This motion was denied by the trial court and such denial is here raised by defendant as constituting prejudicial error. We cannot agree. The granting or refusal of leave to amend is within the trial court's sound discretion. *Chesapeake & Ohio Railway Company v. Newman*, 243 F. (2) 804, 813 (6 Cir., 1957). We do not here find an abuse of such discretion. In view of the nature of this amendment and in the light of what we have said above in regard to the law applicable to the res judicata contention of defendant, such defense is without merit. Its exclusion did not constitute prejudicial error.

III. Proof of Secondary Boycott.

The findings of fact of the district judge as to secondary boycott activities violative of § 303 and of the state com-

[2] One of the contentions advanced by appellant here is that the Board had exclusive jurisdiction of the subject matter of this controversy.

mon law are amply supported by the evidence and are not clearly erroneous. *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 278, 291. It would serve no useful purpose to here review the particular activities.

IV. Damages.

That compensatory and punitive damages are recoverable for unlawful secondary boycott activities cannot be disputed. *Gilchrist v. United Mine Workers of America*, 290 F. (2) 36 (6 Cir., 1961), certiorari denied, 368 U. S. 75; *Flame Coal Company v. United Mine Workers of America*, 303 F. (2) 39 (6 Cir., 1962). That such damages are not capable of precise ascertainment does not preclude their allowance. *United Mine Workers of America v. Osborne Mining Co.*, 279 F. (2) 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931). The basis upon which the lower court awarded compensatory damages in the amount of $19,619.62 was a reasonable and justifiable one. There was evidence to support the award and the trial court's findings are not clearly erroneous. *Commissioner v. Duberstein*, supra. As to the punitive damage award of $15,000.00, we cannot say that there was an abuse of discretion. The fact that the activities here engaged in did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable.

For the foregoing reasons the judgment below is affirmed.

APPENDIX C.

Cause Argued and Submitted
February 9, 1963.

Before: O'Sullivan, Circuit Judge,
Boyd and Thornton, District Judges.

This cause is argued by David Leo Uelmen for defendant-appellant and by M. J. Stauffer for plaintiff-appellee, and is submitted to the Court.

Judgment.

(Filed July 25, 1963.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ Thomas P. Thornton,
United States District Judge,
(Sitting by Designation).

APPENDIX D.

Section 303 of the Labor Management Relations Act of 1947 provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

APPENDIX E.*

SIXTH CIRCUIT			OTHER CIRCUITS			STATE COURTS		
Case	Actual	Punitive	Case	Actual	Punitive	Case	Actual	Punitive
1**	$ 300,000	$100,000	13	$ 760,000	$ 0	16	$ 353,193	$ 0
2	165,000	50,000	14	201,274	?	17	100,000	0
3	84,136	0	15	75,000	0			
4	360,000	119,000						
5	8,225	50,000						
6	5,500	0						
7	15,690	10,000						
8	264,000	0						
9	19,619	15,000						
10	185,000	125,000						
11	?	?						
12	30,000	45,000						
Sub-total	$1,437,170	$514,000	Sub-total	$1,036,274	$ 0	Sub-total	$ 463,193	$ 0.

TOTALS

	Actual	Punitive
Sixth Circuit	$1,437,170	$514,000
Other Circuits	1,036,274	0***
State Courts	463,193	0
	$2,936,637.	$514,000

* We have attempted to tabulate all reported cases in which an award of damages has been made under Section 303 of the Act as of September 1, 1963.

** Case names and citations appear on the next page of this Appendix E.

*** See footnote 14, *infra*, p. 41.

1. **United Mine Workers v. Meadow Creek Coal Co.**, 263 F. 2d 52 (C. A. 6), *cert. denied* 359 U. S. 1013. Violence proved.

2. **United Mine Workers v. Osborne Mining Co.**, 279 F. 2d 16 (C. A. 6), *cert. denied* 364 U. S. 381. Violence proved.

3. **Teamsters Local 984 v. Humko Co.**, 287 F. 2d 232 (C. A. 6), *cert. denied* 366 U. S. 962. No violence.

4. **Gilchrist v. United Mine Workers**, 290 F. 2d 36 (C. A. 6), *cert. denied* 368 U. S. 875. Violence proved.

5. **Flame Coal Co. v. United Mine Workers**, 303 F. 2d 39 (C. A. 6), *cert. denied* 371 U. S. 891. Violence proved.

6. **Wells v. Operating Engineers**, 303 F. 2d 73 (C. A. 6), affirming 206 F. Supp. 414 (W. D. Ky.), wherein the amount of the judgment is reported. No violence.

7. **Blair v. United Mine Workers**, 211 F. Supp. 786 (E. D. Ky.)—punitive damages awarded although not prayed for by plaintiff. Violence proved.

8. **Sunfire Coal Company v. United Mine Workers**, 313 F. 2d 108 (C. A. 6). The court's opinion does not expressly indicate whether any part of the judgment consisted of punitive damages. The opinion of the district court is not reported. Violence proved.

9. **Morton v. Teamsters Local 20**, 200 F. Supp. 653 (N. D. Ohio), aff'd ... F. 2d ... (C. A. 6); reprinted in Appendix B, *supra*, p. 31. No violence.

10. **White Oak Coal Co., Inc. v. United Mine Workers**, 53 LRRM 2351 (C. A. 6). Violence proved.

11. **Allen v. United Mine Workers**, 53 LRRM 2648 (C. A. 6). The court affirmed an award of both actual and punitive damages in an unspecified amount. Violence proved.

12. **Gibbs v. Mine Workers**, 54 LRRM 2080 (E. D. Tenn.). Violence proved.

13. **Longshoremen's Union v. Juneau Spruce**, 189 F. 2d 177 (C. A. 9), aff'd 342 U. S. 237. No violence.

14. **Longshoremen's Union v. Hawaiian Pineapple Co.**, 226 F. 2d 875 (C. A. 9), *cert. denied* 351 U. S. 963. As more clearly appears from the district court opinion an unspecified portion of the judgment consisted of punitive damages. See: 107 F. Supp. 805 (D. Ore.). This case involved violence.

15. **Carpenters Union v. Cisco Construction Co.**, 266 F. 2d 365 (C. A. 9), *cert. denied* 361 U. S. 828. No violence.

16. **Overnight Transportation Co. v. Teamsters**, 257 N. C. 18, 125 S. E. 2d 277, *cert. denied* 371 U. S. 862. No violence.

17. **Dairy Distributors v. Teamsters Local 976**, 8 Utah 2d 124, 329 P. 2d 414, *cert. denied* 360 U. S. 909. Connected case reporting amount of verdict at 294 F. 2d 348 (C. A. 10). No violence.